Office-Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1952.

No. 403

GEORGE SCHMIDT,

*Petitioner,*

*vs.*

UNITED STATES OF AMERICA AND TUCKER CORPORATION,

*Respondents.*

**PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals, For the Seventh Circuit.**

**(Brief and Opinion Below, Annexed.)**

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THE DUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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## PETITION FOR WRIT OF CERTIORARI
**to the United States Court of Appeals,**
**For the Seventh Circuit.**

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## THE MATTER INVOLVED.

Petitioner, a stockholder of Tucker Corporation, acting in the derivative right of the corporation, sued the United States under the Tort Claims Act. (Tr. 3.)

His complaint charges that members and agents of the Securities and Exchange Commission, acting singly, or in conspiracy with the Department of Justice, or in conspiracy with non-governmental concerns, committed the

the cited statutes governing SEC **(15 U. S. C. 77t and 78u).**

**(b)** And also contrary to the intent of the Federal Tort Claims Act **(28 U. S. C. 1346).**

**(c)** And in conflict with decisions of other Courts of Appeals and the Supreme Court, holding that the conduct of the SEC is subject to judicial investigation and remedy, and specifically that "there is nothing in the Act which authorizes *publicity in advance of hearing*", which, this opinion says, is the first specified wrong charged in the complaint,—"giving out information that an investigation was *about to be* instituted." (Tr. 54.)

**Bank of America National Trust and Savings Assn. v. Douglas (C. A. D. C., 1939), 105 F. 2d 100, 105.**

**Jones v. Securities and Exchange Commission (1936), 298 U. S. 1, 26, 56 S. Ct. 654, 662.**

The complaint in this case, as summarized in the opinion (Tr. 49-50, 52), and as appears in even stronger language in the record (Tr. 4-6), *charges,* the motion to dismiss *admits,* and the opinion erroneously *sanctions,* a shocking, corrupt, dictatorial and conspiratorial course of conduct by this government agency, which none of these statutes sanction and which the federal courts should not sanction.

The opinion erroneously says that the quoted SEC statute **(15 U. S. C. 77t and 78u)** "*authorized such conduct*" and confers "*discretion*" so to do. (Tr. 54.)

**2.** The opinion ambiguously quotes the exceptions section of the Federal Tort Claims Act **(28 U. S. C. 2680)** without saying (a) whether the court believes this section has a bearing on this case, or (b) what bearing the court

thinks the section has on the case. (Tr. 55.) If the opinion means to imply that this section excludes this gross tort from the Tort Claims Act, it emasculates the Act by implication. Neither the "due care" nor "discretionary function or duty" clauses of the section exclude the shocking course of conduct charged in this complaint and sanction in this opinion. There is no "discretion" for any governmental agency in the United States (or any country this side of the iron curtain) to commit the corrupt, wanton and dictatorial course of conduct sanctioned in this opinion.

**An important distinction** bearing on both above grounds (1) and (2), and ignored in the opinion, is that the complaint is *not based* upon the primary exercise of discretion *to make the investigation* of Tucker Corporation but upon tortious acts *committed in the ministerial stage* of carrying out the investigation *after* the discretionary function had been exercised.

Failure to observe this distinction between immunity for basic *determinations* made at the *policy-making level,* and *ministerial* acts in carrying them out:

**(a)** Gives blanket license for oppressive and dictatorial acts of government agents, high and low, in carrying out the determination; and—

**(b)** Conflicts with the following decisions in other circuits and this same circuit, which hold that the immunity *ceases* at the *policy-making level* where the basic determination is made (in this case, the determination to investigate the corporation) and *does not extend to cloak tortious conduct in carrying out the determination*:

**Oman v. United States (10 Cir., 1949), 179 F. 2d 738, 740, par. 1.**

**Costley v. United States (5 Cir., 1950), 181 F. 2d 723, 724, par. 2.**

**Stewart v. United States (7 Cir., 1951), 186 F. 2d 627, 630-631.**

**Note**: A straightforward and proper petition for rehearing on the above grounds (Tr. 59-61) was met by an arrogant and personally abusive answer by the United States attorney, attempting to distort the petition into a contempt of court. (Tr. 67-70.)

WHEREFORE, petitioner prays that a writ of certiorari may issue to review the decision below.

JAY E. DARLINGTON,
JOHN R. JEFFERS,
*Attorneys for Petitioner.*

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1952.

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**No.** .....

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GEORGE SCHMIDT,

*Petitioner,*

*vs.*

UNITED STATES OF AMERICA AND
TUCKER CORPORATION,

*Respondents.*

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## BRIEF SUPPORTING PETITION FOR CERTIORARI.

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### Why the Case Merits Review.

The need for review rests upon:

**(1)** The flagrant character of the tort described on the face of the opinion, and—

**(2)** The important and dangerous ruling that this corrupt and conspiratorial conduct—

> "is clearly and specifically *within the discretionary powers and duties* of the Securities and Exchange Commission." (Tr. 54.)

and that

> "It seems therefore to be perfectly clear that under the terms of the applicable statutes the plaintiff in this controversy *cannot* upon a trial establish a case *which*

*would entitle the Tucker Corporation to damages from the Government.* * * *

"Because, the complaint *fails to state a claim* against the United States upon which relief can be granted, the judgment of the District Court is affirmed." (Tr. 55.) (Our emphasis.)

**Nature of the Tort Charged.**

The corrupt and conspiratorial conduct of the government employees plainly appears from the following summary of the complaint in the opinion (our italics):

"Upon information and belief plaintiff-appellant alleges that in the spring and summer of 1948, Tucker Corporation was preparing to start 'mass production of a new type, rear-engine automobile, which would compete in interstate commerce with the products of other automobile manufacturers.' It is also charged on information and belief that the said corporation was then 'particularly vulnerable to the type of interference and injury hereinafter described,' because, in preparation for production, it had invested 'most of its original cash capital in tangible and intangible assets, including machinery and equipment, inventory of material, engineering and advertising expenses, and rental.' Said corporation, it is said, was then lessee and occupant of a large plant and had started the initial production of parts, and 'pilot-type' models of its automobile. Its cash was running low, but it had 2,000 dealers and distributors owing a balance of nearly $4,000,000 on their franchise notes; it enjoyed good commercial and financial relations with concerns doing business with it, and it is said that it had good business relations with the automobile buying public from the sale of its accessories; that it could, and, in the normal course of events, would have succeeded in going forward with the mass production of its automobile.

"It is then charged, again on information and belief, that from the summer of 1948, up to and until March 3, 1949, the Securities and Exchange Commission, and

'the members and agents thereof, engaged in a *course of conduct* toward said corporation which was of such character that in the normal course of events it would have and did *interfere with and injure and destroy said corporation's business.*' It is alleged that said course of conduct consisted, among other things, of the following: (1) That they gave out *surreptitiously,* or caused or permitted to be given out, to a radio broadcaster, the statement that said corporation was *about to be* investigated, knowing that the statement would be broadcast on a nationwide hookup; (2) that in the summer of 1948, they began and carried forward an inquisition against said corporation, its business and its product, in the course of which they interfered with and interrupted the corporation's use of its records and files; they *intimidated* the persons and dealers doing business with the corporation; they *caused to be propagated a rumor* that the corporation was tainted with fraud and illegality; (3) that about March 1, 1949, one of the members of the Commission *surreptitiously* took from its files 'a supposedly secret report' of said inquisition and turned it over to the representative of a *Detroit* newspaper who publicized the contents thereof.

"The complaint then continues:

> 'It is presently impossible for this plaintiff to describe in more detail the aforesaid course of conduct referred to in this paragraph (b), because the facts constituting the same are peculiarly within the knowledge and possession of the defendant and its said agency and agents.'

"The complaint then goes on to allege alternatively, and still upon information and belief, that the tortuous acts in question were committed by the Commission, its members and agents, or by them in *concert* with other agencies of the United States, including the Department of Justice or by them in *concert* with persons and 'concerns' not connected with the Government, *who desired the destruction of said corporation's business.*

"The complaint then charges, still on information

and belief, that said *course of conduct* was entered into and carried out with *intent to destroy* said corporation in its business; and with intent to *prevent* the manufacture and *competition* of its product in *interstate commerce,* and with *wilful* and *wanton* disregard of the consequences which would and did result therefrom.

"Damages were then claimed in the sum of $50,000,000. The complaint asserts that 'there has been inflicted upon said corporation: (1) The *common law tort* of injuring and destroying its business; (2) the *statutory tort* of preventing the manufacture and sale of its product in interstate commerce, contrary to federal anti-trust laws, but this action seeks only compensatory and not punitive damages for this latter tort.'" (Our italics.)

Opinion, Tr. 49-50.

It should be noted that the tortious conduct charged is not *confined* to the three specifications (though these would suffice). The above quoted part of the opinion shows that the basic charge of the complaint was a "course of conduct" by the government employees which was designed to and did accomplish the corrupt and conspiratorial purpose of destroying the corporation's business and excluding its product from interstate commerce. The specified acts are only "among other things" which made up the course of conduct (Tr. 5, 49) and the other parts of the course of conduct are peculiarly within the knowledge of the defendant and cannot now be further specified. (Tr. 5, 50.)

No question is here involved concerning plaintiff's derivative right to sue for his corporation. The opinion is squarely predicated on the ground that *Tucker Corporation has no right to relief.* (Tr. 55.) That the above conduct would be tortious and actionable if done by a private person or corporation is not denied in the opinion, and, for present purposes, is sufficiently indicated by the following recent text:

"There are certain relations affecting a man's trade,

occupation, profession, or means of gaining a livelihood, interference with which, by a stranger, may under certain circumstances or conditions result in liability *wholly apart* from any question of status or *contract*. * * * Holt, Ch. J., made the broad statements that 'where a violent or malicious act is done to a man's occupation, profession, or way of getting a livelihood, there an action lies in all cases.' (Our emphasis.)

30 Am. Jr., Interference, sec. 37, pp. 85, 86.

"No persons, individually or by combination, have the right, directly or indirectly, to interfere with or disturb another in his lawful *business* or occupation, or to threaten to do so, for the sake of compelling him to do some act which, in his judgment, his own interest does not require. Losses wilfully caused by another, from motives of malice to one who seeks to exercise and enjoy the fruits and advantages of his own enterprise, industry, skill and credit will sustain an action." (Our emphasis.)

30 Am. Jur., Interference, sec. 38, pages 86-87.

"Because of the constant tendency to confuse 'malice', signifying absence of justification, with 'ill will,' it is deemed advisable to preface the statements in this section by a reiteration of the meaning of the term, as set forth in another article in this work, to the effect that 'malice in its legal sense does not necessarily signify ill will toward a particular individual but denotes that condition of mind which is manifested by *the intentional doing of a wrongful act without just cause or excuse.* * * * An intent to do a wrongful harm and injury is unlawful, and if a wrongful act is done to the detriment of the right of another, it is malicious. *Anyone who invades a right of another without lawful cause or justification commits a legal wrong.*" (Our emphasis.)

30 Am. Jur., Interference, sec. 39, pages 87-88.

"The interference, by coercion, with the right of a person to enter into, or continue in, any lawful *business*,

> profession, or other line of legitimate endeavor is an unlawful act, *if unjustified,* and a *combination* having such an object in view constitutes a criminal conspiracy." (Our emphasis.)
>
> 30 Am. Jur., Interference, sec. 40, page 89.

As indicated in the part of the text first above quoted, this common law tort is distinct from the tort of interference with *contract,* which is excluded from the Tort Claims Act. **(28 U. S. C. 2680(h).)**

In addition to the above common law tort, it is plain that the conduct above charged, if done by a private person or corporation in concert (conspiracy) with others, would constitute the *statutory tort* of preventing the manufacture and sale of this corporation's product in interstate commerce. **(15 U. S. C. 1 and 15.)** The Tort Claims Act does not preserve any general immunity from statutory torts **(28 U. S. C. 1346)** and this one is not excluded by the exceptions section. **(28 U. S. C. 2680.)**

It is not necessary for plaintiff to establish both torts,—the existence of either one suffices.

**Erroneous Extension of "Discretion" and "Duty" to Cover Oppressive Ministerial Acts of Government Employees.**

The opinion does not deny, but assumes, that both the above torts would exist and be actionable if a private person or corporation had done to Tucker Corporation what these government employees did.

The opinion rests entirely on the premise that this conduct "is clearly *within the discretionary powers and duties* of the Securities and Exchange Commission." (Tr. 54.)

But the sections of the Securities and Exchange Act **(15 U. S. C. 77t and 78u)** quoted in the opinion (Tr. 53)

give this Commission no broader power

ower than many other

regulatory agencies. The power is:

ine if the SEC statute

(1) To "investigate" to determine i

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or regulations have been violated or ar

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(2) "To publish information conce

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gation,—not to *precede* the investigati

radio broadcaster to

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This practice was con-

be used *before* the investigation. This

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demned as beyond, or an abuse of, the Co

engaged in the unlaw-

in the following case, where the SEC eng

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ful and oppressive conduct of publicizin

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against a banking corporation *before* inv

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damaging the corporation's business an

Court enjoined the SEC, saying:

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> "The Securities Exchange Act au
> mission in its discretion to make inv
> make public its findings, but there
> *Act* which authorizes publicity in *ad*
> • • • It is not difficult to see t
> might easily be made an *instrument*
> lacking specific congressional autho
> it ought not to be indulged. In add
> trial publication of evidence—labele
> true—ought, we think, to be avoi
> emanating from the tribunal charge
> responsibility of weighing it and assi
> a fair hearing." (Our emphasis.)

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here is *nothing in the*
in *advance* of hearing.
see that such a power
*ment of oppression* and,
authorization, we think
n addition to this, pre-
abeled as believed to be
avoided, especially as
arged with the judicial
nd assuring the accused
s.)

**ust & Savings Ass'n. v. Bank of America Nat. Trust & Douglas (C. A. D. C., 1939), 1**

)39), 105 F. 2d 100, 105.

oined in the above case

The conduct condemned and enjoined to that charged in this was milder than, but analogous to tha es that the SEC *before* complaint. This complaint charges tha out a *smear* statement investigation, *surreptitiously* gave out a

to a radio broadcaster, and then engaged in a course of *intimidation* and *rumor-mongering,* followed again by *leaking* the contents of its secret investigation report to *one* newspaper (in *Detroit,* significantly, the seat of this corporation's competitors) to be used by it for another smear. (Tr. 5-6.)

In refusing to let the SEC pursue an *oppressive* and illegitimate court of conduct of examining a citizen after he had withdrawn his his registration statement, the Supreme Court said:

> "Since here the only disclosed *purpose* for which the investigation was undertaken had ceased to be *legitimate* when the registrant rightfully withdrew his statement, the power of the commission to proceed with the inquiry necessarily came to an end. Dissociated from the only ground upon which the inquiry had been based, and no other being specified, further pursuit of the inquiry, obviously, would become what Mr. Justice Holmes characterized as 'a fishing expedition • • • for the chance that something discreditable might turn up.' (*Ellis* v. *Interstate Commerce Com.,* 237 U. S. 434, 445, 35 S. Ct. 645, 647, 59 L. Ed. 1036,—an undertaking which uniformly has met with judicial condemnation." (Our emphasis.)
>
> **Jones v. Securities and Exchange Commission (1936), 298 U. S. 1, 26, 56 S. Ct. 654, 662.**

The illegitimate conduct and purpose of the SEC above condemned (conducting a fishing expedition) was mild compared to that charged in this complaint and admitted in this opinion. (Tr. 5-6, 49-50, 52.)

While ignoring the above precedents limiting and remedying abuses of the Commission's powers, the opinion cites (the only case cited in the opinion) **Oklahoma Texas Trust v. Securities and Exchange Commission (10 Cir. 1939) 100 F. 2d 888, 891,** for the proposition that: "The

manifest purpose of the Securities Act is to protect the public against imposition and fraud in the sale of securities in interstate commerce."

But that case is no authority that the conduct here charged is within the Commission's "discretionary powers and duties". (Tr. 54.) Rather, it shows how far this conduct departs from the purpose of the Act.

The opinion also says "the Act provides that any person hurt by an *order* of the Commission may petition the Court of Appeals • • • that such order be modified or set aside." (Tr. 54.) But this complaint does not complain because the Commission entered an order.

If there was initially an order or official determination of the Commission to make an investigation of this corporation (and the complaint and record are silent as to whether there was any such) it is not the *basis* of the complaint. The complaint is for the *surreptitious, oppressive, corrupt and conspiratorial conduct* of one or more of the Commission's members and certain of its employees, beyond the pale of the Commission's legitimate function and powers.

**To hold that such oppressive, corrupt and conspiratorial wrongs against citizens or corporations are privileged and immune to remedy, simply because this Commission (or other similar regulating agency) exercises its "discretion" to "investigate", is to adopt the definition of those terms which prevails east of the iron curtain.**

Prior to the Tort Claims Act, such conduct of government agencies was consistently recognized as *wrong*, but remediless. Now, to avoid the remedy, the opinion below holds that the conduct is *not wrong*,—a step backwards toward governmental tyranny. (Tr. 54-55.)

**Distinction Between "Discretion" at the Policy-Making Level, and Oppression and Corruption at the Ministerial Level.**

The necessary functions of this Commission and similar regulating agencies can be sufficiently preserved, while preventing them from becoming instruments of tyranny in carrying out their functions, by applying the common sense principle that the term "discretionary function or duty" in the exceptions section of the Tort Claims Act **(28 U. S. C. 2680)** applies to the *making of determinations* at the *policy making level* as to whether or not to exercise a certain power (in this case, the determination to investigate the corporation), but that it does not apply to the *ministerial course of conduct* by government employees, high or low, in executing or carrying out those determinations.

This distinction has been recognized in other circuits and even in this same circuit, in the following cases which basically conflict with the result of the opinion below, and which are ignored in the opinion:

In the following case the plaintiff's business consisted of grazing cattle upon Government lands under Government permit. The Government agents had discretion to revoke the permit and thereby make a lawful interference with the plaintiff's business. But instead of doing this, they went beyond the bounds of their discretion by acting in concert with competitors of the plaintiff "with intent to injure and destroy" the plaintiff's rights. The Court of Appeals, in reversing the District Court's dismissal of the complaint, said:

> "Eliminating the claim arising out of misrepresentation, the tortious acts, if any, bringing this case within the jurisdiction of the federal courts, consist *of aiding* and *encouraging* other livestock owners to utilize the grazing lands adjacent to the lands owned

in fee, and of aiding and directing similar acts, *with intent to injure and destroy* plaintiff's exclusive grazing privileges, coupled with the refusal to cancel plaintiff's predecessor's permits, on the grazing lands adjacent to the leaseholds.

"Such acts are not within the exception to the Tort Claims Act based upon discretionary functions. No government employee is *granted the discretion whether* he shall induce or incite third persons to *interfere* with exclusive rights or privileges granted by the United States." (Our emphasis.)

**Oman v. United States (10 Cir., 1949), 179 F. 2d 738, 740, par. 1.**

In the following case the Government agents exercised this discretion as to whether they would or would not furnish maternity hospital service to a soldier's wife. They determined to furnish the service, and then injured her by negligent treatment. The Court of Appeals, in reversing the District Court's dismissal of the complaint, said:

"In order to determine whether or not the government comes within the exemption set out above, we must decide *whether or not it was exercising* a *discretionary* function or duty when its employees *negligently injected* a harmful substance into Mrs. Costley's body. We think they were *not* exercising a discretionary function, because they had *already exercised* their discretion by admitting her into the hospital, and once having admitted her and undertaken the delivery of her child, they were under a duty to attend and treat her." (Our emphasis.)

**Costley v. United States (5 Cir., 1950), 181 F. 2d 723, 724, par. 2.**

The same principle is implicit in **Stewart v. United States, (7 Cir. 1951) 186 F. 2d 627, 630-631,** holding the United States liable under the Tort Claims Act for injury to a boy from the negligent and unlawful manner of

storing grenades at Fort Sheridan. Any such storing necessarily was *preceded* by some *determination* at the policy-making level as to (1) whether to store, (2) what to store, (3) and where to store. In that sense, as in *every* case under the Act, the injury resulted *remotely* but *not directly* from a determination previously made at the policy-making level. But the injury in that case, as in our case, was directly and proximately caused by negligent or wrongful acts of Government agents or employees in the *manner of carrying out* the determination. In the *Stewart* case, the determination to do the storing could have been carried out in a lawful manner. In our case, the Commission's *determination* could and should have been carried out in a *lawful manner without the corrupt and collusive course of conduct* charged in the complaint.

Nearly every activity of a Government agent or employee, whether driving a truck or making up a report for the Securities & Exchange Commission examination, *originates* in the exercise of some discretionary function or duty by some superior. If the terms "discretionary function or duty" were stretched to cover the ministerial activities of governmental agents or employees in carrying out these determinations, few torts would be covered and the Act would be largely meaningless, contrary to the plain purpose of **28 U. S. C. 2674** as liberally construed by the Supreme Court in **Feres v. United States, (1950) 340 U. S. 135, 139-141, 71 S. Ct. 153, 156-157, 95 L. Ed. 152 and United States v. Yellow Cab Co. (1951), 340 U. S. 543, 547, 549-550, 71 S. Ct. 399, 402, 404, 95 L. Ed. 523.**

Therefore, it is respectfully submitted that the writ of certiorari should issue to bring up and review this case.

JAY E. DARLINGTON,
JOHN R. JEFFERS,
*Attorneys for Petitioner.*

## APPENDIX.

(Bold face emphasis ours.)

In the

# United States Court of Appeals

## For the Seventh Circuit

No. 10581. OCTOBER TERM, 1951, APRIL SESSION, 1952.

GEORGE SCHMIDT,
*Plaintiff-Appellant,*
*vs.*
UNITED STATES OF AMERICA and TUCKER CORPORATION,
*Defendants-Appellees.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

July 3, 1952.

Before DUFFY, FINNEGAN and LINDLEY, *Circuit Judges.*

FINNEGAN, *Circuit Judge.* Appellant seeks to reverse an order of the District Court which dismissed his action against the United States brought under the Federal Tort Claims Act.

The complaint alleges that the plaintiff-appellant is a citizen, resident and inhabitant of the United States within the Northern District of Illinois, Eastern Division, and that he is and was at the time of the happenings and events complained of the owner and holder of 1,000 shares of the capital stock, Class A, of the TUCKER CORPORATION, which he purchased from said corporation on the date of its issue. He charges that he begins and prosecutes the proceedings

as a derivative stockholder's action because said corporation, and those in charge of its affairs, have been and are unwilling and unable to do so. He alleges that the action is not collusive.

THE TUCKER CORPORATION is alleged to be a corporation for profit, having its principal office and place of business in Chicago, Illinois, within said district.

It is charged that the Securities and Exchange Commission is an agency of the United States of America.

Upon information and belief plaintiff-appellant alleges that in the spring and summer of 1948, TUCKER CORPORATION was preparing to start "mass production of a new type, rear-engine automobile, which would compete in interstate commerce with the products of other automobile manufacturers." It is also charged on information and belief that the said corporation was then "particularly vulnerable to the type of interference and injury hereinafter described," because, in preparation for production, it had invested "most of its original cash capital in tangible and intangible assets, including machinery and equipment, inventory of material, engineering and advertising expenses, and rental." Said corporation, it is said, was then lessee and occupant of a large plant and had started the initial production of parts, and "pilot-type" models of its automobile. Its cash was running low, but it had 2,000 dealers and distributors owing a balance of nearly $4,000,000 on their franchise notes; it enjoyed good commercial and financial relations with concerns doing business with it, and it is said that it had good business relations with the automobile buying public from the sale of its accessories; that it could, and, in the normal course of events, would have succeeded in going forward with the mass production of its automobile.

It is then charged, again on information and belief, that from the summer of 1948, up to and until March 3, 1949, the Securities and Exchange Commission, and "the members and agents thereof, engaged in a course of conduct toward said corporation which was of such character that in the normal course of events it would have and did interfere with and injure and destroy said corporation's business." It is alleged that said course of conduct consisted,

among other things, of the following: (1) That they gave out surreptitiously, or caused or permitted to be given out, to a radio broadcaster, the statement that said corporation was about to be investigated, knowing that the statement would be broadcast on a nationwide hookup; (2) that in the summer of 1948, they began and carried forward an inquisition against said corporation, its business and its product, in the course of which they interfered with and interrupted the corporation's use of its records and files; they intimidated the persons and dealers doing business with the corporation; they caused to be propagated a rumor that the corporation was tainted with fraud and illegality; (3) that about March 1, 1949, one of the members of the Commission surreptitiously took from its files "a supposedly secret report" of said inquisition and turned it over to the representative of a Detroit newspaper who publicized the contents thereof.

The complaint then continues:

> "It is presently impossible for this plaintiff to describe in more detail the aforesaid course of conduct referred to in this paragraph (b), because the facts constituting the same are peculiarly within the knowledge and possession of the defendant and its said agency and agents."

The complaint then goes on to allege alternatively, and still upon information and belief, that the tortuous acts in question were committed by the Commission, its members and agents, or by them in concert with other agencies of the United States, including the Department of Justice, or by them in concert with persons and "concerns" not connected with the Government, who desired the destruction of said corporation's business.

The complaint then charges, still on information and belief, that said course of conduct was entered into and carried out with intent to destroy said corporation in its business; and with intent to prevent the manufacture and competition of its product in interstate commerce, and with wilful and wanton disregard of the consequences which would and did result therefrom.

**Damages were then claimed in the sum of $50,000,000. The complaint asserts that "there has been inflicted upon said corporation: (1) The common law tort of injuring and destroying its business; (2) the statutory tort of preventing the manufacture and sale of its product in interstate commerce, contrary to federal anti-trust laws, but this action seeks only compensatory and not punitive damages for this latter tort."**

The complaint then alleges in division 5 thereof:

> "(a) This cause of action has been abandoned in fact and in law by the corporation's trustee to the corporation on and since February 20, 1951, and has thereby reverted to the corporation, and said abandonment was in fact made by the trustee with the approval of the court."

Relative to the inability of the corporate management to sue, the complaint alleges in division 5(b) that shortly after the trustee abandoned this cause of action to the corporation, the plaintiff stockholder informed all the available officers and directors of the corporation of the trustee's abandonment and of the existence of this cause of action. He made demand on them to have the corporation sue upon it before it became outlawed and lost, but they took no action.

It then charges:

> "Further, as plaintiff is informed and believes, said corporate management and board of directors is presently incapable of taking action and will not take action in this matter before this cause is outlawed and lost, because of the fact that they are widely scattered and have not met for a long time and are not likely to meet for the conduct of this or other corporate affairs, due to aforesaid destruction of the corporation's business. Plaintiff has exhausted all means within his knowledge and command, except by this action, to have said cause of action filed on behalf of the corporation before it becomes outlawed and lost. Accordingly, it is necessary that this stockholder's action be filed forthwith in order to preserve this cause of action from being lost to the corporation."

In division 6, the complaint alleges that the corporation is made a formal defendant in order to meet the requirements of a stockholder's suit and to bring it before the court, but that the action is really for its benefit and no relief is sought adverse to it or to its property.

The United States met this complaint by moving to dismiss the same on the following grounds:

> (1) The complaint fails to state a claim against the defendant, United States of America, upon which relief can be granted.
>
> (2) That the court lacks jurisdiction because the United States of America has not waived its immunity from suit or consented to be sued upon the claim set forth in the complaint.
>
> (3) The plaintiff does not have the capacity to sue on behalf of the Tucker Corporation or its stockholders; and
>
> (4) The claim is barred by the statute of limitations contained in 28 U. S. C. A. 2401, since it arose more than two years prior to the filing of the complaint herein.

The District Court sustained the Government's motion and dismissed the complaint at plaintiff's costs.

Appellant in support of his contention that the complaint states a case which entitled the TUCKER CORPORATION to relief directs our attention to what this court said in *Asher* v. *Ruppa*, 173 F. 2d 10, on page 12:

> "* * * The law is now settled that upon motions to dismiss a complaint on the ground that it does not state a claim upon which relief can be granted, the complaint should be construed in the light most favorable to the plaintiff, with all doubts resolved in his favor and the allegations accepted as true. *Cool* v. *International Shoe Co.*, 142 F. 2d 318. And if, in view of what is alleged, it reasonably can be conceived that plaintiff can upon the trial make a case which would entitle him to some relief, the complaint should not be dismissed. *Montgomery Ward & Co.* v. *Langer*, 168 F. 2d 182; and *Carroll* v. *Morrison Hotel Corp.*, 149 F. 2d 404."

We propose to apply the test thus laid down to the facts alleged in the complaint here under attack.

It charges a course of conduct by the Securities and Exchange Commission, its members and agents, or by them in connection with other agencies and employees of the Government, or by them in connection with potential competitors of TUCKER CORPORATION in the automobile manufacturing industry, which scheme of conduct in the normal course of events would and did interfere with and destroy the business of TUCKER CORPORATION. Three specifications as to the nature of the course of conduct charged are pointed out. It is first alleged that in the spring of 1948, they (that is the Commission and its agents and their alleged associates) gave out, or permitted to be given out to a radio broadcaster, information that the TUCKER CORPORATION was about to be investigated for fraud and violation of the law in the management of its business, and that said information was immediately broadcast on a nation-wide hookup.

In the second specification, it is alleged that in the early summer of 1948, they (the same persons indicated in the first specification) began and carried forward an inquisition against the TUCKER CORPORATION and its business, and that in the course of such inquisition they interfered with the corporation's use of its records and instituted and propagated a rumor that the TUCKER CORPORATION business was tainted with fraud and illegality.

The third and final specification is that about the first of March, 1949, they (the same persons) took from the files and publicized a "supposedly" secret report of the inquisition conducted by the Securities and Exchange Commission and delivered the same to a representative of a Detroit newspaper.

The Securities and Exchange Act, as amended, provides (15 U. S. C. 77t):

> 77t.—"(a) Whenever it shall appear to the Commission, either upon complaint or otherwise, that the provisions of this subchapter, or of any rule or regulation prescribed under authority thereof, have been or are about to be violated, it may, in its discretion,

either require or permit such person to file with it a statement in writing, under oath, or otherwise, as to all the facts and circumstances concerning the subject matter which it believes to be in the public interest to investigate, and may investigate such facts."

In section 78u of the same Act (15 U. S. C. 78u) it is provided:

"(a) The Commission may, in its discretion, make such investigation as it deems necessary to determine whether any person has violated or is about to violate any provision of this chapter or any rule or regulation thereunder, and may require or permit any person to file with it a statement in writing, under oath or otherwise as the Commission shall determine, as to all the facts and circumstances concerning the matter to be investigated. The Commission is authorized, in its discretion, to publish information concerning any such violations, and to investigate any facts, conditions, practices, or matters which it may deem necessary or proper to aid in the enforcement of the provisions of this chapter, in the prescribing of rules and regulations thereunder, or in securing information to serve as a basis for recommending further legislation concerning the matters to which this chapter relates."

The manifest purpose of the Securities Act is to protect the public against imposition or fraud in the sale of securities in interstate commerce. *Oklahoma-Texas Trust* v. *Securities and Exchange Commission*, 100 F. 2d 888. Moreover, the Act provides that any person hurt by an order of the Commission may petition the Court of Appeals of the United States, in the district wherein such person resides, that such order may be modified or set aside.

The Federal Tort Claims Act (28 U. S. C. 1346) give the district courts of the United States jurisdiction of civil actions "on claims against the United States in money damages, accruing on and after January 1, 1945, for injury or loss of property, personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United

States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

**The question now arises, did the facts alleged in the complaint here in question charge a negligent or wrongful act or omission on the part of any employee of the Government within the scope of his employment?** Under the terms of the Securities Exchange Act above quoted the Commission has discretion to direct or file, or cause to be filed, a statement or complaint in writing concerning a matter which it believes to be in the public interest to investigate. It has the power to make such an investigation. It is authorized to publish information concerning violations of the Act.

**The act charged in the first specification of conduct complained about is that of giving out information that an investigation was about to be instituted. This is clearly and specifically within the discretionary powers and duties of the Securities and Exchange Commission. The statute quoted authorized such conduct as that charged in the first specification.**

In the second specification, the charge is that an investigation was instituted. The investigation is now called an "inquisition." Again the Commission was acting clearly within the scope of its discretionary authority. The same thing is true as to the third act. The conduct complained of in this specification is publishing the report of the investigation or "inquisition." This also is in terms authorized by the specific language of the Securities and Exchange Act. Moreover, the Federal Tort Claims Act (28 U. S. C. 2680) provides:

> "The provisions of this chapter and section 1346(b) of this title shall not apply to—(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."

It seems therefore to be perfectly clear that under the terms of the applicable statutes the plaintiff in this controversy cannot upon a trial establish a case which would entitle the Tucker Corporation to damages from the Government. What we have said sufficiently disposes of the first and second grounds upon which the Government sought to dismiss the complaint, and it makes it unnecessary for us to consider the third and fourth grounds.

Because the complaint fails to state a claim against the United States upon which relief can be granted, the judgment of the District Court is affirmed.